



Advisory Opinion 12-015

This is an opinion of the Commissioner of Administration issued pursuant to Minnesota Statutes, section 13.072 (2012). It is based on the facts and information available to the Commissioner as described below.

Facts and Procedural History:

On August 17, 2012, the Information Policy Analysis Division (IPAD) received a letter from Ellen McVeigh, attorney for the Concordia Creative Learning Academy (CCLA), dated the same. In her letter, Ms. McVeigh asked the Commissioner to issue an advisory opinion regarding certain data that CCLA maintains.

In letters dated, August 22, 2012, the Commissioner offered the teachers involved and Leonard Runck, chair of the Minnesota Board of Teaching (the Board), an opportunity to comment. Mr. Runck did not respond. On September 24, 2012, Cindy Lavorato, attorney for the involved teachers, submitted comments on their behalf.

A summary of the facts follows. Ms. McVeigh wrote in her opinion request:

During the academic year 2011-2012, three licensed teachers were employed under “at will” contracts by CCLA. On March 27, 2012, the Board of Directors placed the three employees on paid administrative leave, pending an investigation of conduct that was the subject of a complaint to CCLA’s authorizer, Concordia University. Within ten days of the placement of the employees on paid administrative leave, the school made reports to the Board of Teaching and the Board of School Administrators, pursuant to Minn.Stat. Section 122A.20, subd. 2, indicating that the employees were on administrative leave pending an investigation of their conduct.

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The Minnesota Board of Teaching requested additional information on each employee, specifically:

1. Date employee began employment with ISD No. 4035;
2. Subject matter taught by each employee during his/her tenure with ISD No. 4035;
3. Whether any of the employees has been the subject of reports, allegations, complaints or any other type of charges that allege inappropriate behavior or conduct unbecoming a teacher;

4. The specific nature of the behavior which was the subject of the reports, allegations, complaints or other type of charges referred to in paragraph 3;
5. The outcome of any investigation or other type of inquiry conducted into the allegations referred to in paragraph 3 above, including but not limited to whether any disciplinary action was taken by the district, and the final outcome of that disciplinary action;
6. Whether the employee filed a grievance against any proposed disciplinary action by the district and if so, the current status of the grievance process; and,
7. Whether CCLA was aware of any involvement by local law enforcement, including investigation, in the allegations referred to in paragraphs 3 and 5 above.

The Board indicates that its request pertains to current and prior allegations, and requests copies of all memoranda, letters, investigative notes, written reprimands and any other type of correspondence generated in response to all incidents covered by paragraphs 3 and 5.

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As part of the settlement [with the involved teachers], CCLA wrote to [the Board]..., indicating that it believed that its initial reports under Minn.Stat. Section 122A.20, subd. 2, were premature and requesting that [the Board] discontinue any investigation of the employees based on CCLA's initial reports. [The Board] has written to CCLA, declining to discontinue its investigation.

Ms. McVeigh then asked for this opinion, asking whether CCLA is required to share private data with the Board pursuant to Minnesota Statutes, section 122A.20, subdivision 2.

Issue:

Based on Ms. McVeigh's opinion request, the Commissioner agreed to address the following issue:

Pursuant to Minnesota Statutes, Chapter 13, would Concordia Creative Learning eAcademy (CCLA) violate the rights of certain employees (licensed teachers) if it releases private personnel data about them to the Minnesota Board of Teaching under Minnesota Statutes, section 122A.20, subdivision 2?

Discussion:

Pursuant to Minnesota Statutes, section 13.03, subdivision 1, government data are public unless otherwise classified. Minnesota Statutes, section 13.43, classifies data on individuals who are current or former employees of a government entity. Subdivision 2 lists the types of personnel data that are public and subdivision 4 classifies most other types of personnel data as private.

An employee's dates of employment and job description are public data under section 13.43, subdivision 2(a)(2) and (3). However, data related to complaints or charges against an employee may be public and/or private. The existence and status of a complaint or charge are public pursuant to section 13.43, subdivision 2(a)(4). When an entity has disciplined an employee, the

final disposition, the specific reasons and data documenting the basis of the discipline become public. Where an employee is not disciplined, only the existence and status of a complaint or charge are public.

In Item 3, the Board seems to be requesting the existence of any complaints or charges, which would be public. However, Items 4 and 5 ask for additional data, some of which, if they exist, might be private data. Specifically, Item 5 requests:

The outcome of any investigation or other type of inquiry conducted into the allegations referred to in paragraph 3 above, *including but not limited to whether any disciplinary action was taken by the district*, and the final outcome of that disciplinary action;
(Emphasis added.)

If there are any complaints or charges against the involved teachers which did not result in a final disposition of disciplinary action, only the existence and status of the complaint or charge are classified as public. Additionally, Items 6 and 7 might also include not public data.

Minnesota Rules, part 1205.0400, subpart 2, restricts access to private data to the data subject, individuals given express written permission by the data subject, employees within the entity whose work assignment reasonably requires access, and entities and agencies who are authorized by statute or federal law.

Minnesota Statutes, section 122A.20, subdivision 2, requires the Board to investigate reports made to it regarding licensed teachers: “[t]he licensing board to which the report is made *must* investigate the report for violation of subdivision 1 and the reporting board must cooperate in the investigation.” (Emphasis added.) As part of its investigation, the Board may access data regardless of its classification under Chapter 13. Subdivision 2 further provides:

Notwithstanding any provision in chapter 13 or any law to the contrary, upon written request from the licensing board having jurisdiction over the license, a board or school superintendent shall provide the licensing board with information about the teacher or administrator from the district's files, any termination or disciplinary proceeding, any settlement or compromise, or any investigative file.

Therefore, the plain language of the law requires CCLA to provide the Board with the requested data.

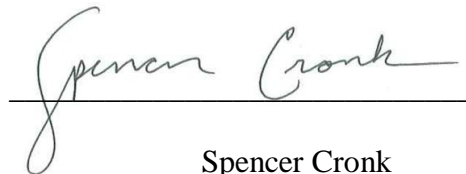
Ms. Lavorato argued in her comments that lack of a proper Tennessen Warning before the initial report precludes CCLA from sharing private data responsive to the Board’s request. However, the Tennessen Warning is a requirement of Minnesota Statutes, section 13.04, subdivision 2, and 122A.20, subdivision 2, clearly states that a school board or superintendent shall provide the Board with certain data from the district’s files, “notwithstanding any provision of chapter 13.” Therefore, the plain language would relieve CCLA from any restrictions imposed on data collected directly from a data subject, should CCLA have failed to provide an appropriate Tennessen warning.

The Commissioner notes that the involved teachers strongly objected to the initial report that CCLA made to the Board. It is their position that a defect in the initial reporting forestalls any subsequent release of data to the Board. In her comments, Ms. Lavorato stated, “[t]he advisory opinion, as [IPAD has] framed it, is predicated on the assumption that CCLA’s original report to the Minnesota Board of teaching was legal.” The Commissioner acknowledges Ms. Lavorato’s concerns. However, this opinion is predicated on the fact that despite CCLA’s statement to the Board indicating that its initial report was premature, the Board has made the determination that its investigation will continue. The Commissioner was not presented with any arguments, statutory provisions or case law that suggests that a report under section 122A.20 can be withdrawn or rescinded (and a subsequent investigation halted), nor can the Commissioner comment on the Board’s internal policies or procedures for receiving, evaluating, or investigating a report. Given those facts, CCLA is now being asked to share private data with the Board. Because of the broad powers granted to the Board by the plain language of section 122A.20, CCLA is required to provide the requested data to the Board regardless of its classification under Chapter 13.

Opinion:

Based on the facts and information provided, the Commissioner's opinion on the issue Ms. McVeigh raised is as follows:

Concordia Creative Learning Academy (CCLA) is required to release private personnel data about the involved teachers to the Minnesota Board of Teaching under Minnesota Statutes, section 122A.20, subdivision 2.

A handwritten signature in dark ink, reading "Spencer Cronk", is written over a horizontal line.

Spencer Cronk
Commissioner

October 8, 2012